

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1945

No. 324

GLOBE INDEMNITY COMPANY, *Petitioner*,
v.
GULF PORTLAND CEMENT COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for
the Fifth Circuit
AND BRIEF IN SUPPORT THEREOF

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To the Honorable the Supreme Court of the United States:

The Petitioner, GLOBE INDEMNITY COMPANY, respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Statement of the Matter Involved

This suit was originally filed by the Respondent, Gulf Portland Cement Company, in the United States District Court for the Southern District of Texas, to recover indemnity and reimbursement under a manufacturer's public liability policy

of insurance (R. 9-15). The policy was issued to Respondent by Petitioner through the office of its General Agent in Houston, Texas (R. 119-120 and 123-124).

Federal jurisdiction was predicated on diversity of citizenship, the Petitioner herein being a New York corporation and the Respondent being a Texas corporation (R. 9 and 23).

Respondent was engaged in the business of manufacturing and selling cement, and for this purpose maintained and operated a cement manufacturing plant at Houston, Texas. The company had determined to enlarge this plant by constructing certain new buildings at its plant site. Arrangements were made for one Ole Peterson, an independent contractor, to drive test piling on the plant site in order to determine the foundation requirements of the new buildings.

Ole Peterson brought a crew of men and pile driving machinery and equipment to the plant site, and the crew began assembling and erecting a pile driving machine for the purpose of driving the test piling. These operations were conducted in close proximity to a power line which provided electric power to operate the cement plant. While Peterson's crew was engaged in erecting the pile driving machine, some of the attachments to said machine which were under their control came in such close proximity to the power line as to cause the current of electricity carried by said line to pass through said pile driving machine and the cables attached thereto and into the bodies of five of Ole Peterson's workmen, two of whom were killed and three seriously injured.

The injured parties and the statutory beneficiaries of the deceased parties filed suit in the State court against Respondent to recover damages for its negligence. Respondent, contending that the injuries in question were covered by the manufacturer's public liability policy issued to it by Petitioner, demanded that Petitioner defend said suits and indemnify it with respect to such claims for damages. Peti-

tioner denied liability under the policy and refused to defend said suits.

Thereafter, Respondent settled all of said suits for a total expenditure of Eighteen Thousand, Six Hundred and Sixty-nine Dollars and Eighteen Cents (\$18,669.18), including expenses, and brought this suit against Petitioner to recover such amount under said policy. The case was tried in the district court without a jury. The district court found that the injuries for which indemnity was sought were not covered by the policy as construed under the laws of Texas and gave judgment for Petitioner (R. 32).

Respondent appealed to the Circuit Court of Appeals for the Fifth Circuit and that court reversed the judgment of the trial court with directions to enter judgment for Respondent (R. 161).

The obligations of the policy were expressly limited to accidents involving bodily injuries to which the policy applied. The policy by its terms applied to injuries suffered or alleged to have been suffered by any person or persons while at the plant or elsewhere if caused by the operation of the work described in the policy, namely, cement manufacturing. It contained express provisions that the policy should not cover in respect of bodily injuries or death caused by work done for the insured by any independent contractor or subcontractor, or caused by new construction work.

The trial court held that since the injuries were sustained by reason of the performance of the work of an independent contractor and new construction work and as an incident thereto, they were not covered by the policy as construed in accordance with the laws of Texas.

The Circuit Court of Appeals agreed that the work was being done by an independent contractor and that it was new construction work, but held that the injuries were not caused by such work within the meaning of the policy. The

only authority it cited in support of its construction of the policy was a prior decision of its own in a case which arose from the State of Mississippi.

The court cited no Texas decisions sustaining its construction of the policy or the rules of construction on which it based its holding. Its decision is contrary to the applicable decisions of the Texas courts.

Jurisdictional Statement

This Court has jurisdiction to review this case by Writ of Certiorari under Section 240(a) of the JUDICIAL CODE, as amended (Acts February 13, 1925, Ch. 229, Sec. 1; 43 STAT. 938; Title 28, U.S.C., Sec. 347).

This is a case in which Federal jurisdiction is based on diversity of citizenship and in which the rights of the parties are to be determined in accordance with the rules of decision prevailing in the Texas courts. The Circuit Court of Appeals, however, has refused to regard the decisions of the Texas courts as rules of decision in the case in violation of Section 34 of the FEDERAL JUDICIARY ACT of September 24, 1789, Ch. 20, Sec. 34; 1 STAT. 92; 28 U.S.C. 725.

The decisions of this Court sustaining jurisdiction in this case are *ERIE RAILROAD COMPANY v. TOMPKINS*, 304 U.S. 64; *RUHLIN v. NEW YORK LIFE INSURANCE COMPANY*, 304 U.S. 202; *NEW YORK LIFE INSURANCE COMPANY v. JACKSON*, 304 U.S. 261; *ROSENTHAL v. NEW YORK LIFE INSURANCE COMPANY*, 304 U.S. 263; *MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION v. BOWMAN*, 304 U.S. 549.

The judgment of the Circuit Court of Appeals was rendered May 3, 1945 (R. 161); Petition for Rehearing was filed by Petitioner on May 23, 1945 (R. 162); and the Order Denying Rehearing was rendered June 6, 1945 (R. 173).

Questions Presented

1. Does the Circuit Court of Appeals have the power to decide this case as an original question upon general principles of Federal law without regard to the applicable decisions of the Texas courts?

2. Is the decision of the Circuit Court of Appeals in this case, construing the legal effect and meaning of the policy, contrary to the decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of *PANHANDLE STEEL PRODUCTS COMPANY v. FIDELITY UNION CASUALTY COMPANY*, 23 S.W. (2d) 799?

3. Is the decision of the Circuit Court of Appeals in this case, construing the meaning of the policy, contrary to the decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of *OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD., OF LONDON, ENGLAND v. NORTHERN TEXAS TRACTION COMPANY*, 224 S.W. 212?

4. Under the laws of the State of Texas, is Petitioner bound by the terms of the policy in question to indemnify Respondent with respect to the injuries upon which this suit was based?

Reasons Relied on For Allowance of Writ

The reasons relied on for allowance of this Writ are as follows:

1. The Circuit Court of Appeals refused to regard the decisions of the courts of the State of Texas as rules of decision in the case in violation of Section 34 of the FEDERAL

JUDICIARY ACT of September 24, 1789, Ch. 20, Sec. 34, 1 Stat. 92, 28 U.S.C. 725.

2. The Circuit Court of Appeals has decided in this case an important question of local law in a way that is in conflict with applicable local decisions.

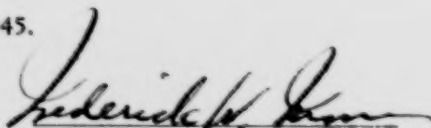
3. By refusing to determine and apply the local law to the decision of the case, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

Prayer

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings of said Court had in the case numbered and entitled on its docket 11,219, GULF PORTLAND CEMENT COMPANY, APPELLANT, VERSUS GLOBE INDEMNITY COMPANY, APPELLEE, and all original exhibits therein to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by the Court and the judgment of the United States District Court for the Southern District of Texas in said cause be affirmed, and in the alternative that the judgment herein of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by the Court and the cause remanded to that Court with instructions to determine the same in accordance with the

laws of the State of Texas, and for such further relief as to this Court may seem proper.

DATED August 8, 1945.

A handwritten signature in dark ink, appearing to read "Fred W. Moore", written over a horizontal line.

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